U.S. Department of Labor

Office of Administrative Law Judges
50 Fremont Street
Suite 2100
San Francisco, CA 94105

(415) 744-6577
(415) 744-6569 (FAX)

Issue Date: 13 February 2003

CASE NUMBER: 2003-AIR-00003

In the Matter of:

William Briggs,
Complainant,

vs.

United Airlines,
Respondent.

ORDER ALLOWING PROCEEDINGS TO CONTINUE UNABATED BY THE AUTOMATIC STAY OF RESPONDENT'S CHAPTER 11 BANKRUPTCY FILING

Respondent United Airlines ("Respondent") fired William Briggs ("Complainant") from his job as a mechanic. Briggs complained to the Assistant Secretary of Labor, claiming that he was fired for raising safety concerns. He asked for reinstatement, back pay, and other protections Congress gave to airline employees under the Wendell H. Ford Aviation and Reform Act for the 21st Century. *49 U.S.C. § 42121 ("AIR 21 Act")*, which the U.S. Department of Labor (DOL") administers. *DOL* investigated but dismissed the complaint as untimely, and Briggs has requested an evidentiary hearing. United Airlines has filed to reorganize in bankruptcy, and claimed the *AIR 21 Act* proceeding is stayed by the Bankruptcy Code's automatic stay, *11 U.S.C § 362(a)*. I find the stay inapplicable because of the exception provided by Bankruptcy Code § 362(b)(4), and the matter will proceed to trial.

The *AIR 21 Act* was enacted in April 2000 to provide protection to employees against retaliation by air carriers because they provided information to an employer or to the federal government relating to air carrier safety violations, or filed, testified, or assisted in a proceeding against the employer relating to any violation of any order, regulation, or standard of the Federal Aviation Administration ("FAA") or any other law relating to the safety of air carriers, or because they are about to take any of these actions. *29 C.F.R. § 1979.100*; *U.S. Dep't of Labor Interim Final Rules and Regulations for AIR-21 Background Information, Federal Register, Vol. 67, No. 62, April 1, 2002*. *DOL* has concluded that *AIR 21 Act* cases should be treated as a "significant regulatory action" because the *AIR 21 Act* is a new program and because of the importance to the FAA's airline safety program that "whistleblowers" be protected from retaliation. *U.S. Dep't of Labor Interim Final Rules and Regulations for AIR-21 Background Information, Federal Register, Vol. 67, No. 62, April 1, 2002*. Finally, *DOL* has exclusive jurisdiction under *49 U.S.C §*

42121 and *29 C.F.R. §§ 1979.100 et seq.* to administer, adjudicate, and provide make whole relief and compensatory damages for these employee protection claims.

Procedural Background

Complainant William Briggs, a mechanic for Respondent United Airlines, filed a complaint with the Assistant Secretary of Labor at DOL (the "Assistant Secretary") on February 20, 2002, pursuant to the *AIR 21 Act* alleging that he was terminated in retaliation for raising safety concerns. Among other statutory rights, Complainant seeks to be made whole and requests reinstatement and back pay.

By letter dated October 3, 2002, the Assistant Secretary, through her Deputy Regional Administrator at the Occupational Safety and Health Administration ("OSHA"), issued a notice of determination and dismissed Complainant's claim due to an alleged untimely filing. The notice of determination also informed Complainant that he had 30 days after receipt to file his objections to the notice of determination and request a hearing before an administrative law judge at the Office of Administrative Law Judges ("OALJ") in Washington D.C. pursuant to 29 C.F.R §§ 1979.105 and 106. OALJ is a subagency of *DOL* with exclusive jurisdiction to adjudicate *AIR 21 Act* actions. *29 C.F.R. § 1979.107 and 109.*

In a letter also dated October 3, 2002, the Assistant Secretary through the Deputy Regional Administrator filed its notice of appearance and gave notice to OALJ that in any litigation that may ensue in the case as a result of an objection, the Assistant Secretary would be represented in the case by the Designated Counsel for Safety and Health Programs at the U.S. Department of Labor, Office of the Solicitor in San Francisco, California.

By letter dated October 16, 2002 to the Chief Administrative Law Judge at OALJ in Washington D.C., Complainant filed a letter objecting to the notice of determination and requesting an extension of time to further litigate the matter. Treating Complainant's October 16, 2002 letter as a request for hearing, I issued an expedited Notice of Trial on October 23, 2002, scheduling a trial in this matter for December 11, 2002, and setting a discovery deadline of November 15, 2002.

On October 29, 2002, I then issued an Order to Show Cause Why Case Should Not Be Dismissed for Untimely-Filed Complaint. By letter dated October 31, 2002, Complainant responded to the Order to Show Cause. By letter dated November 11, 2002, Respondent filed a Reply to Complainant's Response addressing the statute of limitations issue and requesting a dismissal of the case. On November 15, 2002, I issued an Order Finding Good Cause for Hearing and Setting Prehearing Telephone Conference. I found good cause to go forward with the hearing due to an apparent error in the interpretation of the collective bargaining agreement between Complainant's union and Respondent and its effect on Complainant's alleged termination and the corresponding limitations period for filing his complaint. As a result, the issue of whether the complaint was timely filed and whether it was properly dismissed in the first place remains the

subject of a factual dispute, and ultimately the parties agreed that the case would go forward for hearing in San Francisco on April 8, 2003.

By letter dated December 17, 2002, Respondent submitted a Suggestion of Bankruptcy indicating this case should be stayed. On January 8, 2003, I issued an Order to Show Cause Why Proceeding Is Not Exempt Pursuant to 11 U.S.C. § 362(b)(4) from the Bankruptcy Automatic Stay. Respondent filed its reply to the Order to Show Cause on January 24, 2003. By letter dated January 29, 2003, Respondent supplemented its filing by submitting a copy of a January 23, 2003 Order Staying Proceedings in *Sassman v. United Airlines*, 2001-AIR-0007, issued by my colleague, Administrative Law Judge Robert L. Hillyard, in a case pending before him at the Cincinnati District Office of OALJ. Complainant filed his response on January 31, 2003.

The Parties' Positions

Respondent contends that any further adjudication by me is barred because it would violate the automatic stay imposed by *11 U.S.C. § 362(a)* of the Bankruptcy Code and no exception to the stay is applicable given the facts and circumstances of this case. Respondent argues that the *§ 362(b)(4)* exception to Respondent's automatic bankruptcy stay is inapplicable in this case either because: (1) the statute, as amended, does not apply to an *AIR 21 Act* action; or (2) DOL "has not found or pursued any 'public safety policy.'" Respondent's Reply Brief, pp. 2 and 4. Respondent also alleges, however, that the DOL has investigated the complaint and has not filed a notice of appearance. Respondent further alleges that Complainant is pursuing this action in his individual capacity and that the DOL has not "commenced or continued this action... to enforce [its] police or regulatory power. Respondent also argues that Complainant's reliance on the holding in *Bodine v. International Total Services*, 2001-AIR-4 (November 20, 2001), is misplaced. Finally, Respondent argues that this *AIR 21 Act* action "has nothing to do with the general safety issues" and that I am "only authorized [under 29 C.F.R. § 1979.109(b)] to award individual remedies such as reinstatement and back pay." *Respondent's Reply*, pp. 2 and 4.

In sum, Respondent argues that this in an individual matter involving only the Complainant and no governmental unit and also that there is no national safety issue at stake.

Complainant seeks moving forward with his expedited hearing on April 8, 2003, unabated by Respondent's bankruptcy stay pursuant to the statutory exception at *11 U.S.C.§ 362(b)(4)*. Complainant responds that it is irrelevant whether or not Complainant or DOL as a governmental unit proceeds with this *AIR 21 Act* case. "Thus, [Complainant argues] the only question for this ALJ to determine is whether *AIR 21 Act* was intended by Congress to protect national safety policy." Complainant's Response Brief, p. 3.

Issues Presented

The narrow issue presented here is whether the regulatory and police powers exception to the automatic stay applies to this *AIR 21 Act* action where the government has decided to intervene or participate with Complainant. I find that Complainant's position is well supported when applying case law to the unique facts and circumstances of this action and hold that this DOL proceeding is exempt from the automatic stay provision and may continue to move forward unabated by the automatic stay except as to the enforcement of any future money judgment which remains stayed.

Legal Analysis

1. Introduction

When a petition is filed for bankruptcy reorganization under *Title 11, § 362(a)* generally functions as a stay to all other proceedings against the debtor. *Section 362(a)* provides that a bankruptcy petition:

> "[O]perates as a stay, applicable to all entities, of
>
> (1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor ...
>
> (2) the enforcement, against the debtor or against property of the estate ...
>
> (3) any act to obtain possession of property of the estate or of property from the estate ..."

However, *11 U.S.C. § 362(b)* provides for exceptions in which such a petition does not operate as a stay:

> "...(4) under paragraph (1), (2), (3), or (6) of subsection (a) of this section, of the commencement or continuation of an action or proceeding by a governmental unit or any organization exercising authority under the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, opened for signature on January 13, 1993, to enforce such governmental unit's or organization's police and regulatory power, including the enforcement of a judgment other than a money judgment, obtained in an action or proceeding by the governmental unit to enforce such governmental unit's or organization's police or regulatory power;

((5) Repealed. Pub. L. 105-277, div. I, title VI, Sec. 603(1), Oct. 22, 1998, 112 Stat. 2681-866;)."[1]

The legislative history behind § 362(b) helps to define its application:

> "Paragraph (4) excepts commencement or continuation of actions and proceedings by governmental units to enforce police or regulatory powers. Thus, where a governmental unit is suing a debtor to prevent or stop violation of fraud, environmental protection, consumer protection, ***safety***, or similar police or regulatory laws, or attempting to fix damages for violation of such a law, the action or proceeding is not stayed under the automatic stay.
>
> Paragraph 5 makes clear that the exception extends to permit an injunction, and to permit the entry of a money judgment, but does not extend to permit enforcement of a money judgment. Since the assets of the debtor are in the possession and control of the bankruptcy court, and since they constitute a fund out of which all creditors are entitled to share, enforcement by a governmental unit of a money judgment would give it preferential treatment to the detriment of all other creditors."

NLRB v. Edward Cooper Painting, Inc., 804 F.2d 934, 940 & n.3 (6th Cir. 1986)(citing H.R.Rep. No.595, 95th Cong., 2d Sess. 343, *reprinted* in 1978 U.S. Code Cong. And Admin.News 5787, 5963, 6299)(emphasis added).[2]

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[1] The 1998 amendment to section 362(b)(4), (5). Pub. L. 105-277, Title VI, § 603, October 22, 1998 at 112 Stat. 2681-866 added par. (4) and struck out former pars. (4) and (5) which read as follows:
"(4) under subsection (a)(1) of this section, of the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power;
"(5) under subsection (a)(2) of this section, of the enforcement of a judgment, other than a money judgment, obtained in an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power;".

[2] As referenced above, Section 362(b)(4) and (b)(5) were amended in 1998 when additional language involving organizations exercising authority under the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, opened for signature on January 13, 1993 (the "Convention") was added to the excepted language of § 362(b)(4). In addition, former § 362(b)(5) was collapsed into subsection (b)(4). Consequently, other than expanding the list of excepted groups in § 362(b)(4) to add - *the organizations exercising authority under the Chemical Weapons Convention*, the substance of former §§ 362(b)(4) and (b)(5) have remained the same. *See* 2 *Norton Bankruptcy Law and Practice* 2d § 36.18 (1999)(supplement). Therefore case law analyzing former sections 362(b)(4) and (5) remains relevant in this case. See In re Dunbar, 235 B.R. 465, 469 (9th Cir. BAP

The purpose of § 362(b)(4) "is to prevent the bankruptcy court from becoming a haven of wrongdoers." *CFTC v. Co Petro Mktg. Group, Inc.*, 700 F.2d 1279, 1283 (9th Cir. 1983). In addition, allowing actions to fall within this exception to proceed does not fundamentally contravene the policies behind the automatic stay. Legislative history explains that the primary purpose of the automatic stay is to give the debtor a "breathing spell" from actual collection efforts and ensure equal treatment of creditors. *See* S.Rep. No. 95-989, at 49, 54, 55 (1978), *reprinted* in 1978 U.S.C.C.A.N. 5787, 5835-41; *see also U.S. v. Acme Solvents Reclaiming, Inc.*, 154 B.R. 72 (N.D. Ill. 1993)(Citing legislative history for § 362(b)(4))*; In re Continental Airlines, Inc.*, 61 B.R. 758, 776 & n. 36 (S.D.Tex 1986)(same). While governmental agencies proceeding pursuant to the exception may adjudicate their actions to judgment, they can enforce or collect money judgments only by bringing a claim for that amount in the bankruptcy proceeding. *11 U.S.C. § 362(b)(4)* [formerly (b)(5)]. *Thus, the exception does not conflict with the policies behind the automatic stay as much as would an exception allowing enforcement of money judgments outside the bankruptcy proceeding.*

Relevant legislative history sheds some light on the appropriate scope of the regulatory and police powers exception to the automatic stay. When it passed the modern bankruptcy codes in 1973 and 1978, Congress significantly expanded the scope of the automatic stay. *Midlantic Nat'l Bank v. New Jersey Dep't of Envt'l. Prot.*, 474 U.S. 504, 106 S.Ct. 755, 761, 88 L.Ed.2d 859 (1986). When it revised the code in 1978, Congress included the regulatory and police powers exception to the automatic stay as a reaction to decisions of courts that "had stretched the expanded automatic stay to foreclose States' efforts to enforce their antipollution laws." *Id*. Congress "wanted to overrule these interpretations in its 1978 revision," and thus it "expressly" limited the scope of the automatic stay. *Id*.

2. <u>Here, DOL Is the Governmental Unit Enforcing Its Police or Regulatory Powers Under the AIR 21 Act Primarily to Protect Public Safety for Air Travelers</u>

Respondent argues that *DOL*, a "governmental unit," is not proceeding in this *AIR 21 Act* case. Because of this, Respondent submits that there is no "governmental unit" going forward in this case to enforce its police or regulatory powers as required by the *§ 362(b)(4)* exception. As a result, Respondent believes this action remains stayed under *11 U.S.C § 362(a)* without exception.

For the reasons stated below, I hold that *DOL*'s notice of appearance dated October 3, 2002, evidences the fact that *DOL* elected to intervene and go forward in this case under its exclusive jurisdiction to enforce its police or regulatory powers in the interest of national safety. Even so, it is not fatal to the complaint brought under § 362(b)(4) powers here that it was not actually filed by a governmental unit as DOL retains its exclusive jurisdiction under the AIR 21 Act and continues to administer the claim at issue.

1999)(relying on prior case law to interpret new § 362(b)(4)). Respondent's argument that an *AIR 21 Act* action "would not be excepted from the bankruptcy stay" under this new § 362(b)(4) is rejected as frivolous considering that it is unsupported in the legislative history surrounding the 1998 amendments to §§ 362(b)(4) and (b)(5). See *Respondent's Reply Brief*, p.2, footnote 2.

(a) <u>DOL Issued Notice In This Case To Be The Government Unit Going Forward to Enforce Its Exclusive Police or Regulatory Powers</u>

The Bankruptcy Code at *11 U.S.C. §101(27)* provides, in relevant part as follows:

> "governmental unit" means United States; State; Commonwealth; District; Territory; municipality; foreign state; department; agency, or instrumentality of the United States ...."

The legislative history to this section indicates that this subsection defines "government unit" in the broadest sense and further explains the meaning of the term:

> "Department, agency, or instrumentality" does not include entities that owe their existence to state action such as the granting of a charter or a license but that have no other connection with the State or local government or the Federal Government. The relationship must be an active one in which the department, agency or instrumentality is actually carrying out some governmental function."

H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 311 (1977), U.S. Code & Admin. News 1978, p. 6268.

Although *AIR 21 Act* actions, unlike other federal agency discrimination suits,[3] do not require the filing of a complaint by a federal administrative unit, they nevertheless can be considered "proceedings by a governmental unit" within the meaning of the automatic stay exemption. The regulations implementing the *AIR 21 Act* are silent as to whether the Assistant Secretary for Occupational Safety and Health will be the prosecuting party in the case.[4] They do state that at the Assistant Secretary's discretion, the Assistant Secretary may participate as a party or amicus curiae at any time in the proceeding. *29 C.F.R.§ 1979.108(a)(1)*. Nonetheless, the

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[3]Courts have refused to stay proceedings by administrative agencies under the National Labor Relations Act, *N.L.R.B.v Evans Plumbing Co.*, 639 F.2d 291 (5th Cir. 1981), under Title VII of the Civil Rights Act of 1964, *E.E.O.C. v. Rath Packing Co.*, 787 F.2d 318 (8th Cir. 1986).

[4]This is a significant distinction from the express provisions for the role of *DOL* in actions filed under Section 405 of the Surface and Transportation Assistance Act, 49 U.S.C.§ 31105 (hereinafter referred to as the "STAA"). The regulations in STAA cases specifically provide that the prosecuting party shall be the Assistant Secretary for OSHA in any case in which either the employer alone or both the employer and the Complainant object to the Secretary's preliminary findings. It is only when Complainant objects to the preliminary finding that the complaint lacks merit that the Assistant Secretary is not the prosecuting party in an STAA case, although the Assistant Secretary retains the right to intervene as a party. 29 C.F.R. § 1978.107(b). The *AIR 21 Act* regulations were patterned, instead, after the whistleblower regulations of the Energy Reorganization Act ("ERA'), codified at 29 C.F.R. 24.6(f)(1), which provides that the Assistant Secretary, at his or her discretion, may participate as a party or amicus curiae at any time in the administrative proceedings. *U.S. Dep't of Labor Interim Final Rules and Regulations for AIR-21 Background Information, Federal Register, Vol. 67, No. 62, April 1, 2002.*

Assistant Secretary or the administrative law judge at OALJ of DOL must approve any settlement in the case so *DOL* remains involved in each and every *AIR 21 Act* action until completion. *29 C.F.R. §§ 1979.111(d)(1) and (d)(2).*

In this case, it is determinative that the October 3, 2002 letter from a representative of the Assistant Secretary at DOL expressly states that in any litigation that may ensue in the case as a result of an objection, the Assistant Secretary would be represented in the case by the Designated Counsel for Safety and Health Programs at the U.S. Department of Labor, Office of the Solicitor in San Francisco. In sending this letter, the Assistant Secretary chose to exercise his or her discretion to remain an active part of this case. This is the same notice of appearance that Respondent argues does *not* exist here and, thus, is fatal to Complainant's claim that § 362(b)(4) applies to except this case from the automatic bankruptcy stay. *See Respondent's Reply Brief* at p. 4. Respondent is mistaken.

The STAA decision in *Nelson v. Walker Freight Lines, Inc.*, 1987-STA-24 (Sec'y July 26, 1988) ("Nelson") is instructive while not a deciding authority here.[5] In *Nelson*, the Secretary of Labor held that the automatic stay provisions did not apply to the STAA whistleblower proceedings where the complaint was found to have merit and *DOL*'s notice of appearance stated that if any litigation ensued, *DOL* would be represented by the Regional Solicitor from the Denver, Colorado office.

Unlike *Nelson*, the complaint in this case was dismissed for lack of merit, albeit the dismissal may ultimately prove to be erroneous.[6] Nevertheless, like *Nelson* where *DOL* intervened and filed a notice of appearance to participate in any litigation that ensued, here *DOL* took the exact same action with its October 3, 2002 notice of appearance and intervened in this case.[7]

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[5] The *AIR 21 Act* is relatively new having been created in 2000 and there are not many issued decisions.

[6] Whether or not an *AIR 21 Act* complaint is initially dismissed or not is irrelevant to determine whether § 362(b) applies as the initial investigation by OSHA in this expedited proceeding is cursory at best given the extreme time pressures built into the case by statute. For example, written findings must be issued within 60 days of the filing of a complaint. 29 C.F.R § 1979.105. Many times there is either not enough time or qualified personnel are unavailable to make a reliable legal analysis as to the merits of a recently filed AIR 21 Act complaint. As a result, arbitrary dismissals can often occur at the preliminary stage of the case before the record is developed.

[7] Respondent is mistaken with it allegation that no such notice of appearance was filed by *DOL* in this case. See *Respondent's Reply Brief*, pp. 4 and 6. Respondent is also in error with respect to its argument that all retaliation cases brought under Title VII of the Civil Rights Act of 1964 would be stayed and not subject to the exception of § 362(b)(4). See *EEOC v. McClean Trucking Co.*, 834 F.2d 398 (4th Cir. 1987)(action under Age Discrimination in Employment Act and Title VII exempt from stay); *EEOC v. Rath Packing Co.*, 787 F.2d 318 (8th Cir.)(EEOC

Because this case comes before me under the *AIR 21 Act*, is not an STAA proceeding, and the Assistant Secretary issued his or her October 3, 2002 notice of appearance to participate as a party with Complainant or as an intervener, I find that the instant action is factually and legally distinguishable from two STAA cases - *Thomas and Dearman v. Western American Concrete*, 1990-STA-16 (Sec'y April 8, 1991)("Thomas") and *Torres v. Transcon Freight Lines*, 1990-STA-29 (Sec'y January 30, 1991) ("Torres").[8] Both *Thomas* and *Torres* involved holdings by the Secretary that each case was stayed by 11 U.S.C. § 362(a) with no exception where the Assistant Secretary proceeded to investigate each complaint and determined them to have no merit and, thereafter, there was an ensuing absence of the Assistant Secretary either as a prosecuting party or as an intervener under the STAA regulations.

Although *AIR 21 Act* actions, unlike NLRB, NLRA, and EEOC proceedings, do not require the filing of a complaint by a Federal administrative unit, they nevertheless can be considered "proceedings by a governmental unit" within the meaning of the automatic stay exemption. The regulations implementing the *AIR 21 Act* specifically allow the Assistant Secretary to participate as a party or *amicus curiae* at any time in the administrative proceedings. 29 C.F.R.§ 1979.108. In the case before me, the Assistant Secretary through the Deputy Regional Administrator filed his or her notice of appearance and gave notice to our office that in any litigation that may ensue in the case as a result of an objection, the Assistant Secretary would be represented in the case by the Designated Counsel for Safety and Health Programs at the U.S. Department of Labor, Office of the Solicitor in San Francisco, California.

As a result, I find the Assistant Secretary has exercised his or her discretion by filing the notice of appearance and, together with Complainant, will prosecute the case before me. Moreover, I find that the case before me falls within the exemption of § 362(b)(4) of the Bankruptcy Code if it also involves DOL's enforcement of its police or regulatory power discussed in Section 3. below.

(b) Alternatively, It Is Not Fatal to the Applicability of Section 362(b)(4) That This Action Was Not Filed By a Government Unit

Assuming *arguendo* that this case does not have *DOL* as an intervener or prosecuting party, Bankruptcy Code § 362(b)(4) can still apply to exempt this case from the automatic stay as long as *DOL* continues to administer this case and, as a result, enforces its police or regulatory power. Stated differently, it is not fatal to the applicability of § 362(b)(4) that this action was not filed or is not being prosecuted by DOL as a "governmental unit." *See In re Dervos*, 37 B.R. 731 (Bktcy. N.D. Ill. 1984)(Bankruptcy judge held that it is not fatal to a complaint brought under § 362(b)(4) that the complaint was not actually filed by a governmental unit as long as it is

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action seeking injunctive relief and back pay not subject to stay as action was for purpose of protecting public policy), *cert. denied*, 479 U.S. 910, 107 S.Ct. 307, 93 L.Ed.2d 282 (1986).

[8] I find that this action is factually distinguishable from the facts in the recent *AIR 21 Act* decision in *Sassman v. United Airlines*, 2001-AIR-7 (ALJ January 23, 2003) as the Government was found to be not involved in the case as DOL had not filed a notice of appearance. In addition, *Sassman* is not binding on this Court.

determined that the proceeding was commenced in the interest of the public health, safety, or welfare and that harm would result to the public if the government action was stayed); *In the Matter of The Briarcliff*, 16 B.R. 544 (Bkrtcy. N.J. 1981)(Stay inapplicable despite non-governmental unit filing complaint where stay would preclude municipality's agent from effective enforcement or redress, other than the bankruptcy court, of its police power to enact local rent controls); *Dongelewicz and Rizzo v. Oneida Water Co.*, 1994 WL 932303 (Pa.P.U.C)(Pennsylvania Pub.Utility Commission followed *In re Dervos'* holding referenced above, among other things, in finding that the automatic stay was inapplicable).

Conversely, one district court decision and a bankruptcy court decision, both from the Southern District of New York are cited by Respondent and apply a narrower interpretation of the term "governmental unit" and the § 362(b)(4) exception. One case provides that corporations pursuing a citizen's suit under the Clean Air Act were not "governmental units" and, the other, that the New York Stock Exchange was not a "governmental unit." Courts in both cases refused to lift the automatic stay. *See In re Revere Copper and Brass, Inc.*, 32 B.R. 725, 727 (S.D.N.Y. 1983) and *In re Colin, Hochstin Co.*, 41 B.R. 322 (Bktcy.S.D.N.Y. 1984), respectively.

This area of the law is unsettled and I am not bound to follow the decisions from the Southern District of New York. Therefore I reject the *In re Revere Copper and Brass, Inc.* and *In re Colin, Hochstin Co.* decisions in favor of following the decisions in *In re Dervos, supra*. and *In the Matter of The Briarcliff, supra*. Furthermore, the *In re Revere Copper and Brass, Inc.* and *In re Colin, Hochstin Co.* decisions are factually distinguishable in that neither case was administered with a governmental agency such as DOL as in this case - one being a private lawsuit filed in district court by two corporations and the other being an investigation by a private organization.

Respondent seems to argue that if its bankruptcy filing occurred during DOL/OSHA's initial investigation of the complaint, the § 362(b)(4) exception to the automatic stay would apply but that the § 362(b)(4) exception no longer applies if the same bankruptcy filing occurs later when the complaint is being administered for adjudication by DOL/OALJ. There should be no distinction between DOL's OSHA investigation of an AIR 21 Act whistleblower claim as a valid exercise of DOL's police or regulatory power and DOL's OALJ's further administration of the same claim for purposes of applying § 362(b)(4). At either point in time, DOL retains its exclusive jurisdiction over the claim for final adjudication or settlement. *29 C.F.R.§§ 1979.104-109*; *see also In re Mansfield Tire and Rubber Co.*, 660 F.2d 1108, 1114 (6th Cir. 1981)(No distinction between implementation and administration of workers' compensation claims by State and agencies created for purposes of valid exercise of the police or regulatory power of a governmental unit exempt under § 362(b)(4) from the automatic stay); *In re Tauscher*, 7 B.R. 918, 920 (Bkrtcy E.D.Wis.)(DOL Secretary is excepted from the automatic stay and may continue with administrative procedures to the extent of fixing the penalties to be assessed for child labor violations, up to and including the entry of a money judgment).

Also, there should be no distinction in applying the exemption under § 362(b)(4) in situations where, on the one hand, various governmental agencies, such as EEOC and NLRB, prosecute their own actions on behalf of individual claimants alleging discrimination and unfair labor practices, and DOL, on the other hand, administers and adjudicates the AIR 21 Act whistleblower claims in a similar manner on behalf of individual claimants. What is determinative as to the application of § 362(b)(4) is whether the agency is exercising, enforcing, or pursuing a

valid police or regulatory power *not* whether the case was filed with the agency for adjudication by the claimant. This "form over substance" dichotomy for analyzing the scope of the "governmental unit" definition in § 362(b)(4) is rejected. DOL has exclusive jurisdiction and expertise under the *AIR 21 Act* to give monetary relief just as NLRB does with its cases. I defer to DOL's primary, specialized jurisdiction for the handling of its *AIR 21 Act* cases. Any different interpretation of § 362(b)(4) in this case would effectively halt all *AIR 21 Act* cases and disrupt the significant purpose of protecting whistleblowers who inform others about air carrier safety violations whenever a respondent files for bankruptcy protection, an event occurring with more and more frequency in the airline industry.

Another case extending the scope of the § 362(b)(4) exception is the case styled *United States ex. Rel. Doe v. X, Inc*., 246 B.R. 817 (E.D. Va. 2000). In that case, a district court judge for the Eastern District of Virginia held that a False Claims Act complaint filed by a private individual, suing as a qui tam plaintiff on behalf of the United States, was excepted from the automatic stay pursuant to § 362(b)(4) even before a decision on the part of the United States was made to intervene and assume direct responsibility for the case. *Id*. at 821. The court in *U.S. ex Rel. Doe* determined that the government, or a qui tam plaintiff acting on behalf of the government, may proceed to judgment with a case under the False Claims Act despite an intervening bankruptcy on the part of one or more of the defendants. *Id*. The court in *U.S. ex. Rel. Doe* reasoned that the real party in interest in a qui tam suit is the United States because even when it elects not to intervene, the government receives the lion's share of any amount recovered and retains significant rights over the litigation. *Id*. At 819-20.

DOL, through its representatives at OSHA and/or the OALJ, has the exclusive jurisdiction to administer, investigate, adjudicate, and settle all *AIR 21 Act* cases. 29 C.F.R. §§ 1979.103-111. It is not fatal to the application of § 362(b)(4) that this case was filed by Complainant rather than a governmental unit because the case remains subject to DOL's exclusive jurisdiction and DOL, either through OSHA, the Solicitor's Office, or OALJ, continues to administer, adjudicate, and/or settle the case under the AIR 21 Act. As referenced in Section 3. below, *DOL* retains exclusive jurisdiction over this particular type of whistleblower case to enforce our national safety policy.

3. <u>This Proceeding Is Not Soley Pecuniary But, Instead, Heavily Effectuates Public Policy</u>.

Respondent next argues that this *AIR 21 Act* proceeding is limited to Complainant's individual claims and requested remedies and does not involve any issues of national safety. *Respondent's Reply Brief*, p. 4. Therefore, according to Respondent, there are no police or regulatory powers to enforce here and the § 362(b)(4) exception to the stay does not apply. I now consider whether the § 362(b)(4) exception applies to *DOL* proceeding involved in this case.

The phrase "police or regulatory power" refers to the enforcement of laws affecting health, welfare, morals, and safety, but not regulatory laws that directly conflict with the control of the res or property by the bankruptcy court. *Hillis Motors, Inc. v. Hawaii Auto. Dealers' Ass'n*, 997 F.2d 581, 591 (9th Cir. 1993). The section 362(b)(4) exception has been applied in a variety of contexts, including labor law enforcement, *NLRB v. Twin Cities Electric*, 907 F.2d 108 (9th Cir. 1990), state bar disciplinary proceedings, *Wade v. State Bar of Arizona*, 948 F.2d 1122,

1123-24 (9th Cir. 1991) and employment discrimination actions brought by the *Equal Employment Opportunity Commission, EEOC v. Hall's Motor Transit Co.*, 789 F.2d 1011, 1014 (3rd Cir. 1986).[9]

There should be no question that a complaint filed under the *AIR 21 Act* is a proceeding by a governmental unit to enforce that unit's "police or regulatory power." In *Bodine*, 2001-AIR-4, supra., as mentioned in Respondent's Reply Brief, p. 6, fn 8, ALJ Thomas M. Burke "suggests that whistleblower actions under that statute [AIR 21 Act] are not stayed even when they are *not* brought by a 'federal administrative unit' because such cases are 'actions to enforce our national safety policy.'" Moreover, as referenced above, DOL's interim final rules for the AIR 21 Act explicitly recognized that this law protects employees against retaliation because they provided information regarding "air carrier safety violations" and should be treated as a "significant regulatory action" because of its importance to the FAA's airline safety program..*See U.S. Dep't of Labor Interim Final Rules and Regulations for AIR-21 Background Information, Federal Register, Vol. 67, No. 62, April 1, 2002*. Hence, this question is easily and confidently answered in the affirmative as I find that the *AIR 21 Act* is a regulatory law, undeniably public in nature, with its primary purpose being the protection of public health and safety in connection with air travel.

Moreover, most courts that have faced this issue have determined that the exception applies.[10] Of course, not every agency action against a debtor can be characterized as one that enforces "police or regulatory power." Consequently, courts interpreting the regulatory and police powers exception generally use two tests to determine whether a governmental action falls within the exception: the "pecuniary purpose" test and the "public policy" test. *In re Universal Life Church, Inc*., 128 F.3d 1294, 1297 (9th Cir. 1997).

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[9] *See also* footnote 10 hereafter.

[10] *See, e.g. In re LaPorta*, 26 B.R. 687 (Bkrtcy N.D. Ill. 1982)(DOL Secretary allowed to initiate administrative proceeding under the Service Contract Act free from stay); *Pension Ben. Guar. Corp. v. LTV Corp*., 875 F.2d 1008, 1020 (2d Cir. 1989)(action to enforce ERISA within exception), *rev'd on other grounds*, 496 U.S. 633, 110 S.Ct. 2668, 110 L.Ed.2d 579 (1990); *NLRB v. Twin Cities Elec. & Eng'g., Inc*., 907 F.2d 108 (9th Cir. 1990)(NLRB enforcement proceedings not stayed); *Brock v. Rusco Indus., Inc*., 842 F.2d 270, 273 (11th Cir. 1988)(Secretary's action to enforce Fair Labor Standards Act not subject to automatic stay), *cert. denied*, 488 U.S. 889, 109 S.Ct. 221, 102 L.Ed.2d 212 (1988); *EEOC v. McClean Trucking Co*., 834 F.2d 398 (4th Cir. 1987)(action under Age Discrimination in Employment Act and Title VII exempt from stay); *EEOC v. Rath Packing Co.*, 787 F.2d 318 (8th Cir.)(EEOC action seeking injunctive relief and back pay not subject to stay as action was for purpose of protecting public policy), *cert. denied*, 479 U.S. 910, 107 S.Ct. 307, 93 L.Ed.2d 282 (1986); *Ahrens Aircraft, Inc. v. NLRB*, 703 F.2d 23 (1st Cir. 1983)(enforcement proceeding seeking back pay exempt from automatic stay); *NLRB v. Evans Plumbing Co.*, 639F.2d 291 (5th Cir. 1981)(proceeding based on unfair labor practice seeking reinstatement with back pay not subject to stay); *In re Poule*, 91 B.R. 83, 87 (9th Cir. BAP 1988)(California Contractor's Licensing Law found to be a legitimate exercise of California's police power such that Registrar's assessment of civil penalties exempt from stay).

Under the "pecuniary purpose" test, the court asks whether the government's proceeding relates primarily to the protection of the government's pecuniary interest in the debtor's property and not to matters of public policy. See *NLRB v. Edward Cooper Painting, Inc.*, 804 F.2d 934, 942 (6th Cir. 1986); *In re State of Missouri*, 647 F.2d 768, 776 (8th Cir. 1981), *cert. denied*, 454 U.S. 1162, 102 S.Ct. 1035, 71 L.Ed.2d 318 (1982). If it is evident that a government action is primarily for the purpose of protecting a pecuniary interest, then the action should not be excepted from the stay. In contrast, the "public policy" test distinguishes between government proceedings aimed at effectuating public policy and those aimed at adjudicating private rights. *See Edward Cooper Painting*, 804 F.2d at 942. Under this second test, actions taken for the purpose of advancing private rights are not excepted from the stay. *Id.*

This is not a case involving contract damages or seeking a remedy for private contract breach as Respondent infers. *See In re Corporacion de Servicios Medicos Hospitalarios de Fajardo*, 805 F.2d 440, 445-47 (1st Cir. 1986)(Holding that § 362(b)(4) does not apply to action by governmental unit to enforce its contractual rights).[11] In the case at bar, I conclude that this *AIR 21 Act* proceeding is exempt from the stay under either test. The remedies available to Complainant under *49 U.S.C § 42121(b)(3)(B)* and *29 C.F.R. § 1979.109(b)* are not designed to advance the government's pecuniary interest. Complainant's pursuit of reinstatement and back pay claims are primarily to protect employees against retaliation by air carriers, their contractors, and their subcontractors, because they provided information to the employer or the federal government relating to air carrier safety violations, or filed, testified, or assisted in a proceeding against the employer relating to any violation or alleged violation of any order, regulation, or standard for the Federal Aviation Administration ("FAA") or any other law relating to the safety of air carriers, or because they are about to take any of these actions. *See 49 U.S.C. § 42121(a); 29 C.F.R. 1979.100(a); and U.S. Dep't of Labor Interim Final Rules and Regulations for AIR-21 Background Information, Federal Register, Vol. 67, No. 62, April 1, 2002* . Furthermore, *DOL* has concluded that the *AIR 21 Act* "should be treated as a 'significant regulatory action' ... because AIR21 is a new program and because of the importance to FAA's airline safety program that 'whistleblowers' be protected from retaliation." *U.S. Dep't of Labor Interim Final Rules and Regulations for AIR-21, Section VI Executive Order 12866, Federal Register, Vol. 67, No. 62, April 1, 2002 (emphasis added)*. Also, such penalties are a deterrent against retaliatory conduct.

In *E.E.O.C. v. McLean Trucking Co.*, 834 F.2d 398,402 (4th Cir. 1987), the same argument about pecuniary relief was raised where the EEOC proceeded under Title VII on behalf of a discharged employee seeking injunctive relief and a make-whole remedy including back pay, reinstatement, and any other relief necessary to eradicate the effects of the discrimination. The Forth Circuit Court of Appeal held that the EEOC was suing in exercise of its police or regulatory power and was, therefore, exempt from the automatic stay despite seeking to recover this pecuniary relief because *the EEOC acts not just for the benefit of specific individuals, but, more importantly, to vindicate the public interest in preventing employment discrimination. Id.* (Emphasis added.) Similarly, DOL, through the AIR 21 Act, passes the pecuniary purpose test despite seeking pecuniary relief on behalf of Complainant because DOL acts not just for the benefit of specific individual whistleblowers, but, more importantly, to protect public health and safety by preventing retaliation against whistleblowers involved in reporting air carrier safety

[11] Cited by Respondent at p. 3 of its *Reply Brief*.

violations.

Complainant alleges these very same whistleblowing activities in his complaint. Therefore, this action is not a proceeding for the primary purpose of protecting the government's claim of entitlement to a pecuniary interest in the debtor's estate. *See N.L.R.B. v. Continental Hagen Corp*., 932 F.2d 828, 833 (9th Cir. 1991)(citing *Edward Cooper Painting*, 804 F.2d. at 942; *see also United States v. Nicolet, Inc.*, 857 F.2d 202 (3rd Cir. 1988) (holding that in a CERCLA suit the U.S. is not seeking to redress private wrongs nor suing as a "consuming participant in the national economy," but acting under explicit Congressional authorization to hold violating parties accountable).

The "public policy" test also presents no barrier to this proceeding going forward. Despite the fact that Complainant may recover some pecuniary interest in the form of back pay if he prevails, I do not characterize the use of that remedy as an assertion of private rights. I conclude instead that the request for reinstatement and back pay as remedies provided by the *AIR 21 Act* are but another method of enforcing the policies under the *AIR 21 Act*. Such federal powers are a necessary and important adjunct to its responsibilities to protect its whole citizenry from negligent or reckless maintenance practices in the airline industry. The authority to protect the public welfare would be largely meaningless without the power to punish and prevent. My conclusion is bolstered by the fact that any back pay award to Complainant would not receive any extra priority by virtue of the *AIR 21 Act* action. Actual collection of any back pay award must proceed according to normal bankruptcy procedures. Such remedies violate neither the pecuniary purpose test nor the public policy test.

In addition, as referenced above, the *AIR 21 Act* is designed to prevent employers from violating federal labor law and retaliating against employees who provide information relating to, among other things, air carrier safety violations. The law itself was designed and passed in recognition that employees themselves could act best to protect the public safety. As Senator John Kerry, a co-sponsor of the initial Senate version of the bill, stated:

> Flight attendants and other airline employees are in the best position to recognize breaches in safety regulation and can be the critical link in ensuring safer air travel....Aviation employees perform an important public service when they choose to report safety concerns. No employee should be put in the position of having to choose between his or her job and reporting violations that threaten the safety of passengers and crew.

Cong. Rec., p. S2855 (March 17, 1999.)[12]

In these times when airline bankruptcies have become commonplace and their reorganizations naturally focus on reducing operating costs to survive, DOL's exclusive jurisdiction and regulatory power to administer and enforce AIR 21 Act whistleblower actions should be allowed to go forward unimpeded by the automatic stay in the significant public interest

[12]Incredibly, Respondent argues that this case "has nothing to do with the general safety issues" and that "there is no national safety issue at stake." Respondent's Reply Brief, p.4. I disagree.

of national safety.[13] Accordingly, I hold that the instant *AIR 21 Act* action is exempt from the automatic stay under section 362(b)(4).

It is, therefore,

ORDERED that further proceedings in this case are not stayed with the exception of the enforcement or collection of any future money judgments that may be issued.

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Gerald Michael Etchingham
Administrative Law Judge

[13] DOL administers and enforces a similar statutory scheme with respect to the *Federal Water Pollution Control Act, 33 U.S.C § 1367*. In discussing DOL's active role in administering this type of case, the Secretary of Labor stated in *McClure v. Interstate Facilities, Inc.*, 1992-WPC-2 (Sec'y June 19, 1995), a case brought under the analogous employee protection provisions of the *Water Pollution Control Act*:

> "This is not an ordinary lawsuit where a plaintiff's consent to settle a complaint ends the inquiry. The Department of Labor does not simply provide a forum for private parties to litigate their private employment discrimination suits such that the parties are free to resolve the case as they choose. Protected whistleblowing may expose not just private harms but health and safety hazards to the public, and the secretary of Labor has been entrusted by Congress to represent the public interest in keeping the channels of information open."